No. 97-174

In The

Supreme Court of the United States

Octber Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners ("Cass County" or "the County") respectfully submit this Reply Brief, in response to Respondent's Brief filed by the Leech Lake Band of Chippewa Indians ("the Band").

ARGUMENT

I. CONGRESS HAS MADE UNMISTAKABLY CLEAR ITS INTENT THAT TAXABILITY OF TRIBAL FEE LAND IS A NECESSARY CONSEQUENCE OF ITS ALIENABILITY.

A. The *Yakima* Decision Applied The Unmistakably Clear Intent Rule And Found It Satisfied By Implication.

Much of the Band's argument focuses on the lack of an express statutory statement establishing the taxability of the lands at issue. The Band concludes that absent an express statement the unmistakably clear intent rule applicable to Indian taxation issues cannot be satisfied. However, this Court's decisions require only clear intent, not necessarily an express statement of intent. This distinction is illustrated by the language of the Court in *Yakima*, which the Band ignores. In demonstrating that an express statement is not the only way in which Congress can make clear its intent to permit state taxation of Indians or Indian property, the Court said:

> In other words, the [Burke Act] proviso *reaffirmed* for such "prematurely" patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to real estate taxes.

County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 264 (1992) (emphasis added, footnote omitted). And the court stated further:

> Since the proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to *all* fee-patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the

> Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period. . . . " Brief for United States as *Amicus Curiae* 13, n.10.

Id. n.4 (emphasis by Court). As this straightforward language shows, the *Yakima* Court concluded that express language was not necessary for section 5 of the General Allotment Act to permit state taxation of tribally-owned fee land. Moreover, the Burke Act proviso in section 6 of the General Allotment Act served simply to make it clear that "prematurely" patented land, as well as land generally allotted under section 5, would become taxable upon issuance of the fee patent.

In contending that an implication cannot satisfy the unmistakably clear intent rule, the Band states that "It tortures the language to equate 'imply' with making something unmistakably clear." Resp. Br. at 33-34 n.2.* To the contrary, "implied" is defined in Black's Law Dictionary as "used in law in contrast to 'express', i.e., where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or *necessary deduction* from the circumstances, the general language, or the conduct of the parties." Black's Law Dictionary (6th ed. 1990) at 754 (emphasis added).

Thus, Congress' clear intent can be shown by implication as well as by express language. If this Court had considered express permission by Congress necessary for taxation of alienable tribal land it would have said so in *Yakima*.

B. The *Goudy* Court Based Its Holding Of Taxability On The Alienability Of The Land In Question.

The Band argues that this Court's decision in *Goudy v. Meath*, 203 U.S. 146 (1906), upholding the taxability of land owned in fee by an individual Indian, was not really grounded on the free alienability of the land. Resp. Br. at 36-40. Instead, referring to both this Court's decision in *Goudy* and the Washington Supreme Court decision which gave rise to Goudy's

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* "Resp. Br. at ___" designates pages in Respondent's Brief.

appeal, the Band argues that the holding of taxability was based primarily on the fact that Goudy, by virtue of an Act of Congress, had become a citizen of the United States, and therefore had lost his rights to his inherent immunities as an Indian. Resp. Br. at 37. In short, the Band concludes that "Goudy himself was considered to be, not an Indian, but a 'citizen' of the United States." Resp. Br. at 40.

The *Goudy* decision, however, was not, as asserted by the Band, grounded on the fact that "the jurisdictional bar against state taxation . . . was removed by Goudy's citizenship." Resp. Br. at 38. To the contrary, as this Court explained in *Yakima*, 502 U.S. at 263, the *Goudy* decision was grounded on the alienability of the land in question. The *Yakima* Court said:

> But (and now we come to the misperception [on the part of the Yakima Nation and *Amicus* United States] concerning the *structure* of the General Allotment Act) *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in these cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance. As the first basis of its decision, before reaching the "further" point of personal jurisdiction under § 6, *id.*, at 149, the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." *Ibid.*

(emphasis by Court, footnote omitted).

Notwithstanding this clarification by the Court that the basis for the holding of taxability in *Goudy* was the alienability of the land, the Band contends that the *sine qua non* for that holding was "*Goudy's* (sic) renunciation of his tribal relations – which removed him from the special jurisdictional protections given to Indians." Resp. Br. at 40. A review of the Washington Supreme Court decision giving rise to Goudy's appeal to this Court shows that the Washington Court no more grounded its

decision on the fact that Goudy had renounced his membership in the Puyallup Tribe than did this Court in affirming that decision.

Rather than the narrow holding described by the Band, the state court decision, like its affirmance by this Court, was based on the land's alienability. And there can be no doubt that the Washington Court considered its decision applicable to Indians generally; it plainly did not, as urged by the Band, consider its decision applicable only to Goudy as a "citizen." Regarding the release by Congress of the restrictions on alienability previously imposed by the applicable treaty and patent, the court said:

> As we have attempted to show above, the restrictions named in the treaty and in the patent were upon the alienation of the land. Congress intended that the Indian should not dispose of his lands until a certain time. In order to accomplish this object, it was necessary to provide against involuntary as well as voluntary sale. . . . These restrictions are against alienation. . . . It follows that these restrictions have been removed, and that the land in question is now taxable.

Goudy v. Meath, 80 P. 295, 297 (Wash. 1905). *Goudy* is thus far more than the "relatively minor, fact-specific opinion" described by the Band at page 36 of its brief.

To sum up, both *Goudy* and *Yakima* are consistent with the development of the statutory law from the allotment period through enactment of the IRA to the present time: absent a clearly manifested directive by Congress to the contrary, freely alienable land owned in fee by an Indian tribe or its members is subject to state and local taxation.

C. Unless Expressly Provided Otherwise, Congress Has Consistently Linked The Free Alienability Of Indian Land Owned In Fee With Its Taxability.

The Band incorrectly characterizes Cass County's position in this case as claiming that Congress treats the terms "alienable" and "taxable" as "synonymous." Resp. Br. at 17. To the

contrary, the County's position in this case, while recognizing that "alienability" and "taxability" are separate and distinct concepts, also recognizes that they are linked together in the historical context of Congress' treatment of Indian-owned lands.

One example of Congress' recognition of this linkage is found in the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, cited and discussed at pages 17-18 of Respondent's Brief. The Act provides in relevant part:

> All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent.

30 Stat. at 507. The Band interprets this provision as permitting non-homestead land to be "nontaxable but still alienable," with homesteads "both nontaxable and nonalienable." Resp. Br. at 18. That interpretation is only partly correct. Rather than simply permitting non-homestead land to be "nontaxable but still alienable," the statute provides that such land remains nontaxable only while the title remains in the original allottee, with its nontaxable status not to exceed twenty-one years from the date of issuance of the patent. In other words, the non-homestead land remains exempt from taxation for a period of twenty-one years only so long as the allottee does not convey it to someone else. Once alienated, it loses the trust protection and becomes taxable.

In enacting this statute Congress gave the allottee a grace period of twenty-one years before his non-homestead land would become taxable. This demonstrates that Indian-owned land is not automatically tax-exempt. Congress found it necessary to expressly provide a twenty-one-year exemption period for the original allottee, with the clear implication that the land would become taxable before expiration of that period if owned by anyone else, including another individual Indian or an Indian tribe.

Thus the tax exemption for the land turned not on the status of its owner as an Indian but on the owner's status as the original allottee. This provision is consistent with Cass County's position that alienable land is subject to taxation unless Congress expressly provides otherwise. Here, Congress expressly provided a tax exemption for the original allottee limited to twenty-one years.

Likewise, the other statutes[1] cited and discussed by the Band at pages 18-19 of its brief link nonalienability with nontaxability. That is, they provide that allotted lands are exempt from taxation so long as restrictions on their alienability remain in place, but become taxable when those restrictions are removed by Congress. Thus the treatment of Indian-owned lands by Congress has generally remained the same from the allotment era to the present time. If lands are held in trust by the federal government or are under some other restriction against alienation imposed by Congress, they are exempt from taxation. If, on the other hand, they become freely alienable and are not exempt under some other provision of law, they become subject to state and local taxation.

The Band also cites the decision in *Choate v. Trapp*, 224 U.S. 665 (1912), as support for its contention that there is no linkage, as a general principle, between alienability and taxability with respect to Indian-owned lands. That decision does not support that contention; it stands instead for the proposition that once Congress has granted an exemption from state and local property taxes for a specified period of time, that exemption cannot be cut short, even by congressional action.

The land at issue in *Choate* had been allotted to members of the Choctaw and Chickasaw Tribes pursuant to the Curtis Act, *supra*, as amended by the Act of July 1, 1902, ch. 1362, 32 Stat. 641. *See* 224 U.S. at 668-69. In a 1908 enactment, Congress removed all restrictions on alienation of the allotted lands and provided that the lands were subject to immediate

[1] Those statutes are: Act of June 30, 1919, ch. 4, 41 Stat. 3, 16; Act of February 25, 1920, ch. 87, 41 Stat. 452; and Act of May 27, 1908, ch. 199, 35 Stat. 312, 313.

taxation. *Id.* at 670. On appeal by the Tribes from a decision of the Oklahoma Supreme Court ruling that the State's subsequent assessment of property taxes was proper, this Court held that, notwithstanding Congress' repeal of the tax exemption, Oklahoma's imposition of a tax on the lands was improper because the original twenty-one-year tax exemption granted by Congress "was binding upon Oklahoma," *id.* at 673, as "a vested property right which could not be abrogated by statute." *Id.* at 678-79. As long as an allottee did not sell his land it remained tax-exempt for the original twenty-one-year period. *Id.* at 673.

Thus the *Choate* decision, holding that an exemption from property taxes granted for a specified period of time cannot be shortened by subsequent legislation, is inapposite to this case involving the issue of whether, in the absence of congressional legislation to the contrary, taxability is a consequence of alienability. This case does not involve the kinds of legislative amendments at issue in *Choate* and, as discussed above, Congress has consistently linked restrictions on the alienation of Indian lands with the tax exemption of those lands.

This Court, in a number of decisions over the years, has also recognized that linkage. For example, in *United States v. Rickert*, 188 U.S. 432 (1903), the Court expressly recognized that land allotted under the General Allotment Act, including permanent improvements thereon, was exempt from taxation only by virtue of its being held in trust for the allottee by the United States.[2] The Court said:

> [U]ntil a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians.

Id. at 437.

and

[2] Significantly, *Rickert* was decided prior to enactment of the Burke Act in 1906, which the court of appeals held was required for taxation of the lands in this case. *See* Pet. App. 15-18.

> While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged.

Id. at 442. *See also United States v. Nice*, 241 U.S. 591, 601-02 (1916) (citing *Rickert* for the rule that land held in trust by the federal government is exempt from taxation).

To the same effect was the decision in *Mahnomen County v. United States*, 319 U.S. 474 (1943), where the Court, in determining whether an individual Indian had paid taxes on her property voluntarily or involuntarily, stated that she had "no conceivable claim of exemption" after expiration of the twenty-five-year trust period provided under the General Allotment Act. *Id.* at 478. And nearly forty years later, after reviewing the legislative history underlying passage of the General Allotment Act, the Court concluded that:

> It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States "hold the land . . . in trust" . . . simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation.

United States v. Mitchell, 445 U.S. 535, 544 (1980).

To summarize, in the absence of specific legislation to the contrary,[3] freely alienable land owned in fee by a tribe or tribal member is subject to state taxation.

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[3] Amici Curiae Hoopa Valley Tribe, et al., argue that alienable lands should be considered taxable only if Congress expressly provides so. *See* Brief of Hoopa Valley Tribe at 11-16. Amici cite 25 U.S.C. § 379 as an "allotment statute" containing "a provision for the taxation of property alienated thereunder." *Id.* at 15. Rather than an allotment statute, section 379 is a provision in the general Indian Descent and Distribution laws which, with certain exceptions, permits the heirs of a deceased allottee to sell inherited trust land or other land "containing restrictions upon alienation." The statute simply makes it clear that, in this particular circumstance, such "restricted" land becomes taxable upon sale by a deceased allottee's heirs. In addition, the statutes cited at page 15 of the Amicus Brief, providing explicit exemptions from taxation with respect to specific land transactions, are consistent with Congress' practice of using express language when it intended that Indian lands be exempt from taxation.

D. Enactment Of The Indian Reorganization Act Reaffirmed Congress' Intent To Link Alienability With Taxability.

The Band argues that Congress, by its silence, has not shown an unmistakably clear intent that lands such as those sold to non-Indians under sections 4, 5, and 6 of the Nelson Act remain subject to ad valorem taxation upon subsequent reacquisition by the Tribe. Resp. Br. at 11-12. The basis for this argument is that Congress, operating under the assumption during the allotment era that tribal ownership of land would in the future cease to exist, saw "no need to think of, consider, or legislate about what would happen if surplus lands eventually went back into tribal ownership." Resp. Br. at 13. While the Band may be correct that during the allotment era Congress was not anticipating reacquisition of Indian lands by the tribes, it clearly did so in enacting the Indian Reorganization Act ("the IRA") in 1934.

In enacting the IRA Congress passed specific legislation applicable to Indian lands reacquired by both tribes and tribal members. The IRA extended any existing trust periods and restrictions on alienation covering allotted lands. 25 U.S.C. § 462 (1996). It also permitted the Secretary of the Interior to purchase lands in trust for Indian tribes or individual Indians, specifying that the trust lands would be exempt from state and local taxation. 25 U.S.C. § 465 (1996). The regulations implementing section 465 clearly recognize that land owned in fee by an Indian tribe or its members is subject to ad valorem taxation. For example, state and local governments are expressly permitted to comment on a federal proposal to place lands in trust, *see* 25 C.F.R. § 151.10; and the Secretary of the Interior is required to take into consideration "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. § 151.10(e). Furthermore, the Secretary is now required to give 30 days

notice before taking land into trust, 25 C.F.R. § 151.12(6), and judicial review is permitted during that 30-day period before title is transferred to the United States. *See Department of the Interior v. South Dakota*, ___ U.S. ___, 117 S. Ct. 286, 287 (1996).

These provisions of the IRA and the applicable regulations are also consistent with section 461 of the IRA which prohibits future allotments to individual Indians but does not return "allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs, and assigns." *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 264 (1992). As this Court stated in *Yakima*, by leaving the previously allotted lands fully alienable, Congress "chose not to terminate state taxation upon those lands as well." *Id.* And if Congress chose not to make allotted lands exempt from taxation, there is no reason to believe that it would render other lands held in fee, whether owned by individual Indians or Indian tribes, tax-exempt.

To summarize, if Congress had wished to exempt tribal fee lands from taxation it would have done so as part of the IRA. Instead, Congress enacted section 465 of the IRA which authorizes the Secretary of the Interior, in his discretion, to acquire lands in trust and exempt from taxation for the benefit of individual Indians or Indian tribes. If, as the Band urges, land owned in fee by Indian tribes is exempt from taxation in the absence of an express statement by Congress to the contrary, there would have been no need for Congress to enact the tax exemption language in section 465 of the IRA.

II. THE RULE THAT TAXABILITY OF TRIBAL LAND IS A NECESSARY CONSEQUENCE OF ITS ALIENABILITY DOES NOT UNDERMINE THE CONGRESSIONAL POLICY PROMOTING TRIBAL SELF-GOVERNANCE.

A. The IRA Demonstrates The Consistency Between Cass County's Position In This Case And The Federal Government's Policy Of Tribal Self-Governance.

On pages 21-25 of Respondent's Brief the Band makes the argument, as did the Yakima Nation in *County of Yakima v.*

Yakima Indian Nation, 502 U.S. 251 (1992), that taxation of its land would infringe upon its right of self-governance. That argument is without merit.

As this Court has observed, "the intent and purpose of the IRA was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). If Congress believed that taxation of freely alienable tribal lands would undermine the goals of the IRA, it would have sheltered those lands from taxation. It did not do so, however. Rather, it provided tax-exempt status only to lands held in trust pursuant to section 465.

In dismissing the same infringement argument in *Yakima*, the Court stated:

> Turning away from the statutory texts altogether, the Yakima Nation argues that state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactments. This seems to us a great exaggeration. While the *in personam* jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not. In any case, these policy objections do not belong in this forum. If the Yakima Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.

Id. at 265.

Thus, as this Court has determined, state taxation of freely alienable tribal land held in fee, in the absence of an express directive by Congress to the contrary, is consistent with both the comprehensive statutory framework of the IRA and the goals underlying the enactment of that law.

B. The *In Personam* Tax Cases Cited By The Band Are Inapposite To The Issue In This Case.

In rejecting the Yakima Nation's argument that taxation of its land interfered with its right of self-governance, the Court drew a clear distinction between *in personam* taxes which result in personal liability and *in rem* real estate taxes which are an encumbrance upon the land. *Yakima*, 502 U.S. at 265 (quoted at p. 11, *supra*).

In making both its statutory and infringement arguments, the Band disregards this distinction.[4] For example, the Band relies heavily on this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976), for the proposition that even a "broadly worded" statute like Public Law 280, 28 U.S.C. § 1360, was not clear enough to support a personal property tax on an Indian-owned mobile home. Resp. Br. at 9.

Bryan, like the other *in personam* tax cases cited by the Band, is distinguishable from this case. The basic issue in *Bryan* was whether Public Law 280 granted the State sufficiently broad civil jurisdiction to permit imposition of the tax in question. *Id.* at 381. The Court held that it did not. *Id.* at

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[4] None of the eight cases cited by the Band as support for its unmistakably clear intent argument on pages 8 and 9 of its brief involve the taxation of tribal land: *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973) (personal income tax on reservation Indian deriving entire income from reservation sources); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (state use tax on personalty installed on off-reservation federal trust land); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (tribal royalty income from oil and gas leases issued to non-Indian lessees); *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989) (oil and gas severance taxes imposed on non-Indian oil and gas producers operating on reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 216 (1987) (state regulation of bingo operations conducted by tribes on reservations); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (income tax on tribal members earning income from Tribe and living in "Indian Country and motor vehicle tax on tribal members living and keeping vehicles on tribal land); *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (motor fuels tax on tribal retailer operating on reservation).

388-89. In contrast, the issue in this case is whether Congress has provided the State with the relatively narrow *in rem* jurisdiction necessary to impose a tax on freely alienable tribal land owned in fee. As this Court held in *Yakima*, Congress has done so.

C. The *In Personam* Regulatory Cases Cited By The Band Are Inapposite To The Issue In This Case.

In making its infringement argument, the Band also cites a number of decisions involving regulatory issues which are inapposite to the *in rem* property tax issue in this case.[5] Those decisions are inapposite because they apply a "balancing of interests" test which is not applicable to tax cases. As this Court explained in *Yakima*:

> Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity [of a tax] since it is that very balancing which we have reserved to Congress.

Id. at 267 (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 177 (1980)). It is apparent that Congress has conducted such a balancing of interests test with respect to state taxation of freely alienable tribal land; and the result is a body of federal law evincing, as to the issue in this case, Congress' unmistakably clear consent to the taxation of such land.

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[5] *United States v. Mazurie*, 419 U.S. 544 (1975) (prosecution of non-Indian for illegal introduction of alcoholic beverages into reservation); *United States v. Wheeler*, 435 U.S. 313 (1978) (federal criminal prosecution); *Williams v. Lee*, 358 U.S. 217 (1959) (civil suit by non-Indian against Indian with cause of action arising on reservation); *Montana v. United States*, 450 U.S. 544 (1981) (regulation of hunting and fishing); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (regulation of hunting and fishing); *State v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404 (1997) (civil lawsuit against non-Indians with cause of action arising on non-Indian land); *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989) (regulation by Yakima Nation of use of land owned by non-Indians).

III. THE INDIAN NONINTERCOURSE ACT DOES NOT APPLY TO THE TRIBAL LANDS AT ISSUE IN THIS CASE.

A. The Indian Nonintercourse Act Applies Only To Tribal Lands Which Have Never Been Made Alienable By Consent Of Congress.

The Band's final argument in support of nontaxability is that the tribal lands at issue in this case are governed by the Indian Nonintercourse Act ("the INA"), 25 U.S.C. § 177 (1996), which renders them inalienable and therefore exempt from taxation.[6] Resp. Br. at 41-50. The Act provides in relevant part:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 (1996).

The apposite case law shows that the INA applies only to lands which have never been made alienable by consent of Congress. For that reason it does not apply to the lands at issue in this case, which were rendered alienable under the Nelson and General Allotment Acts. The Band's complaint commencing this action states that the Band owns these lands "in fee simple, free of any trust ownership on the part of the United States," and that "[t]he Band acquired the Properties by deed

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[6] The Band filed a Conditional Cross Petition for a Writ of Certiorari which was denied on November 3, 1997. Supreme Court File No. 97-235. Since that Petition, which would have encompassed the land parcels held taxable by the court of appeals, was denied, the Band's INA argument can apply only to the parcels which the court of appeals held exempt from taxation (those sold to non-Indians as pine lands and under the Homestead Act in accordance with sections 4, 5, and 6 of the Nelson Act). The Band's INA argument cannot apply to the parcels held taxable by the court of appeals, because such an argument would seek to expand, rather than simply defend, the judgment below in favor of the Band.

from private owners." Pet. App. 53-54, 55. Because the lands are now tribal property the Band claims that it cannot alienate them without the consent of the United States. As the Ninth Circuit Court of Appeals observed, however: "No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply." *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355, 1359 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994) (citations omitted).

In addition to *Lummi* a number of other federal court decisions demonstrate that an essential element for application of the INA to tribal fee land is that "the United States has never approved or consented to the alienation of the tribal land." *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983), *rev'd on other grounds*, 476 U.S. 498 (1986); *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Golden Hill Paugusset Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994). There is no question that Congress, pursuant to the Nelson Act of 1889, approved the alienation of the lands reacquired by the Band in this case, including the allotted lands and the lands sold to non-Indians as pine lands and under the Homestead Act. For that fundamental reason those lands are not today subject to the INA.[7]

B. The Cases Cited By The Band Also Show That The INA Applies Only To Tribal Lands Which Have Never Been Made Alienable By Consent Of Congress.

On pages 43-48 of Respondent's Brief the Band cites three decisions of this Court and numerous lower federal

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[7] *See also Anderson & Middleton Lumber Company v. Quinault Indian Nation*, 919 P.2d 379, 387 (Wash. 1996) (holding that the INA does not apply to land patented in fee under the General Allotment Act and subsequently reacquired by an Indian Nation).

court decisions as support for its INA argument. Those decisions do not provide support for the proposition that tribal land made freely alienable by congressional action, and subsequently reacquired in fee by an Indian tribe, becomes once again inalienable under the INA or any other federal statute. Rather, those decisions confirm that the INA applies only to tribal lands which have never been rendered alienable by congressional consent. Taking first the Supreme Court decisions cited by the Band:

In *Federal Power Com'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), *reh. denied*, 362 U.S. 956 (1960), the Court held that fee lands originally obtained by the United States for the Tuscarora Nation in 1804, held in trust for the Nation by the Secretary of War from 1804 to 1809, and subsequently conveyed to the Nation by the United States, were subject to condemnation under the Federal Power Act because the INA is not applicable to the federal government. *Id.* at 120, 134. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Court held that the cession of aboriginal lands by the Oneida Indian Nation to New York State in 1795, without the consent of the United States, was invalid under the first INA, 1 Stat. 137, 138, enacted in 1790. *Oneida*, 414 U.S. at 664-68. Finally, the Band cites *United States v. Candelaria*, 271 U.S. 432 (1926), as holding that "the INA applies to Pueblo lands even though they are held by fee simple title." Resp. Br. at 46-47. That description of the holding in *Candelaria* is correct as far as it goes, but the determinative fact respecting application of the INA in *Candelaria* was that Congress had never consented to the alienation of the lands at issue. Specifically, the Court held that a lower court judgment transferring ownership of Indian lands, in the absence of authorization or appearance by the United States in the court action, violated the INA. *See id.* at 443-44.

Thus, the facts in these cases,[8] involving lands which had never been made alienable by consent of Congress, are clearly distinguishable from the facts in this case involving reacquisition of lands by the Band where Congress, through the Nelson Act, had previously given its consent to alienation.

Among the lower federal court decisions which the Band claims support its INA argument, it cites as "particularly relevant" the decision in *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958). The Band asserts that *Alonzo* stands for the proposition that the INA applies to tribal lands no matter how acquired by the tribe. Resp. Br. at 47-48. The Band's description of the holding in *Alonzo* does not tell the whole story.

In addition to the INA, the court in *Alonzo* dealt with section 2 of the New Mexico, Arizona Enabling Act, 36 Stat. 557-59, which provided that all lands governed by the Act, "the right or title to which [was] acquired [by any Indian or Indian tribes] through or from the United States or any prior sovereignty [would] remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . . . " The *Alonzo* court concluded that the Enabling Act did not terminate the application of the INA to the lands in question, *id.* at 196, and also relied for its holding of non-alienability on section 17 of the Act of June 7, 1924, 43 Stat. 636, 641, which provided in relevant part that:

> No right, title or interest in or to the lands of the Pueblo Indians of New Mexico . . . and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto . . . shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

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[8] A fourth Supreme Court decision cited by the Band at page 47 of its brief did not expressly involve the INA, and simply held that Congress has the power to legislate with respect to lands owned in fee by Pueblo tribal members. *See United States v. Sandoval*, 231 U.S. 28, 48 (1913).

Id. at 195. Again, the INA was held to apply to tribal lands which had never been made alienable by consent of Congress.

The decision in *United States v. University of New Mexico*, 731 F.2d 703 (10th Cir. 1984), *cert. denied*, 469 U.S. 853 (1984), cited by the Band at page 47 of its brief, is distinguishable from this case for the same reason *Alonzo* is distinguishable. In holding that the lands in question were inalienable, the court said:

> The Pueblo Lands Act of 1924 required that the United States, "in its sovereign capacity as guardian of said Pueblo Indians," file suits on their behalf to quiet title to their lands. Ch. 331, § 1, 43 Stat. 636. Section 17 of the Pueblo Lands Act [the same operative provision cited by the Tenth Circuit in *Alonzo*] reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act. *Id.* at 641-42.

731 F.2d at 706.[9] The balance of the lower court decisions[10] cited by the Band as support for its INA argument, Resp. Br. at 45-47, are similarly inapposite to the facts in this case.

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[9] This Court has held that Congress intended section 17 of the Pueblo Lands Act, rather than the INA, to apply to Pueblo lands. *See Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 250-51 (1985).

[10] *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981) and *Cayuga Indian Nation of New York v. Cuomo*, 565 F.Supp. 1297, 1315 (N.D.N.Y. 1983) (both involving purchase of aboriginal Indian land without federal approval); *Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp.*, 418 F.Supp. 798, 807 (D.R.I. 1976) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69 (1974), and stating that "[T]he Act was designed precisely to protect aboriginal title"); *United States v. 7405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938) (land held in trust for the Tribe by the United States); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1047 (5th Cir. 1996) (claim to lands under Texas law – court stating that purpose of INA was to protect Indian tribes' aboriginal title); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 588, 590 (1st Cir. 1979) (affirming jury verdict that tribe had voluntarily abandoned tribal status for purposes of INA).

None of them involves lands which have already been rendered alienable by consent of Congress.

C. The Statutory Law Does Not Support The Band's Contention That The Tribal Lands At Issue In This Case Are Governed By The INA.

The Band's final argument on the INA issue is that a review of certain congressional enactments supports its position that its tribal lands are inalienable. Resp. Br. at 48-50. Those federal enactments do not support the Band's position.

The primary congressional enactment relied upon by the Band as support for its INA argument is Congress' 1960 amendment of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 635 (1996), which, among other things, lifted the restraints of the INA to permit the Navajo Tribe to convey previously purchased fee land without federal approval. Resp. Br. at 48-49. The Band asserts that that action by Congress demonstrates its recognition that the INA applies to tribal fee land. Resp. Br. at 48. That blanket assertion does not accurately state the reason for this legislation. The portion of the House Report on the Navajo-Hopi legislation quoted by the Band on page 49 of its brief shows that Congress was concerned about two cases holding that the INA prohibited the alienation of Indian lands in the absence of consent by Congress. *Federal Power Com'n v. Tuscarora Indian Nation*, 265 F.2d 338, 342 (C.A.D.C. 1958), *rev'd*, 362 U.S. 99, 105 (1960), *reh. denied*, 362 U.S. 956 (1960); *Tuscarora Nation v. Power Authority of the State of New York*, 257 F.2d 885, 887, 894-95 (2d Cir. 1958) (both involving lands originally conveyed to the Indian Nation by the United States in 1804). *See* Jt. App. at 15.** These decisions led the Department of the Interior to conclude that legislation was necessary to permit alienation of the land governed by the Rehabilitation Act. The Department's report stated with respect to the decisions: "We believe that the title should be unrestricted. Prior to the

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** "Jt. App. at ___" designates pages in the Joint Appendix which has been filed with the Court.

Tuscarora decisions, the assumption was that such lands were unrestricted and were not subject to federal control." Jt. App. at 19.

Likewise, the special congressional enactments cited by the Band at pages 49-50 of its brief, which deal with particular matters of local concern, are not authority for the contention that the INA should be held applicable to fee lands acquired by Indian tribes on the open market, such as the lands in this case. The fact that Congress felt it necessary or advisable to pass special laws approving a few isolated real estate transactions provides no support for the Band's sweeping INA argument in this case.

CONCLUSION

Based on the foregoing reasoning and authorities, and those set forth in Cass County's initial brief, the County respectfully requests that the Court reverse that portion of the decision of the Eighth Circuit Court of Appeals holding that the pine land and homestead parcels are not subject to ad valorem taxation.

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Respectfully submitted,

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